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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENYON RAY GRAHAM, Defendant and Appellant.	A124093 (Marin County Super. Ct. No. SC161887)

Defendant Kenyon Ray Graham pled guilty to receiving a stolen vehicle, evading a peace officer, and driving under the influence of alcohol. The trial court imposed sentence for the first two of these crimes and suspended imposition of sentence for the third. Defendant appeals, arguing that the trial court violated the prohibition in Penal Code section 654[1] against imposing a sentence for two crimes that have the same objective, and also that the court erred by imposing these sentences consecutively. We find no error and therefore shall affirm.

BACKGROUND

According to the statement of factual basis set forth by the prosecutor at the plea hearing, sometime near midnight on November 18, 2008, Novato police officers observed defendant "driving a vehicle that was smoking very badly and speeding." The officers activated their lights in an attempt to stop defendant, but he failed to stop and struck a parked car and hit a curb before getting out of the car and fleeing. When police caught

[1] Further statutory references are to the Penal Code unless otherwise noted.

defendant, he had " signs of being under the influence of alcohol. He exhibited red, watery eyes, slurred speech and an unsteady gait. There was also a partially empty beer can in a backpack that he had. He failed sobriety tests and he refused to give a [preliminary alcohol screening] test or take a blood, breath or urine test." An investigation revealed that the vehicle defendant had been driving belonged to a woman who had parked the car at a nearby mall, that the woman did not know defendant and had not given him permission to take the car, and that the ignition had been "shoved in and a pair of scissors were being used to operate" it.

Defendant was charged by complaint with one count of receiving a stolen vehicle (§ 496d, subd. (a)), with three prior convictions alleged; one count of evading a peace officer in a motor vehicle (Veh. Code, § 2800.1, subd. (a)); one count of driving under the influence (Veh. Code, § 23152, subd. (a)); one count of resisting, delaying or obstructing a peace officer (§ 148, subd. (a)(1)); and one count of driving without a valid license (Veh. Code, § 12500, subd. (a)). He pled guilty to the first three counts and admitted one prior. The remaining two counts were dismissed.

At the sentencing hearing, the court denied probation for the first two counts and sentenced defendant to the low term of 16 months in prison for receiving a stolen vehicle, and to a consecutive 60 days in county jail for evading a peace officer. The court suspended imposition of sentence on the count of driving under the influence and placed defendant on three years' probation. Defendant received credit for 97 days of custody and the court deemed his jail time served. Defendant timely filed a notice of appeal.

DISCUSSION

Defendant argues that the trial court erred under both section 654 and California Rules of Court, rule 4.425 by imposing consecutive sentences for the counts of receiving stolen property and evading a peace officer. At sentencing, defendant's attorney argued that imposing a sentence for evading a peace officer violated section 654. "He's driving in the stolen car away from the scene and fleeing from the police. I think that those are the same acts, and I don't think he can be double punished for those. I'm requesting that when the court imposes the 16 months, that you not give him consecutive local time on

one of the misdemeanors. . . . So my request is that you just give him 16 months on count 1, that you stay any further sentence on count 2 pursuant to 654, and you sentence him to a standard first disposition on the drunk driving charge." The district attorney argued "I don't see the 654 argument here. We've got a stolen vehicle that he's driving around. That crime is completed. He's in possession of the vehicle. Then when he's contacted by the police, he takes off and evades the police officer; two separate criminal acts here."

Defense counsel then argued for concurrent sentencing. "I mean, whether or not the court finds that 654 bars consecutive sentencing, the real question is, why not give him concurrent time on the misdemeanor and send him to prison? If the court feels that prison is the appropriate disposition in this case, which I think you do, then the question becomes, What is the necessity? It's all one abhorrent [*sic*] period of behavior. Those are the sentencing rules. They're a little broader than 654. 654 says it has to be the same act. The sentencing rules say that if it's one period of abhorrent [*sic*] behavior, then that militates towards concurrent time . . . ." The prosecutor argued that it was still his position that "What you have here is an opportunity for the defendant to cease his criminal behavior and to pull over, and instead, he decides to disobey the officer and then even try to flee after the car has been wrecked, so we believe that it shouldn't be concurrent."

The trial court concluded, "I think these are independent crimes. Even if one considers the course of action as a continuing course of action by the defendant, I think he had every opportunity, from my review of the factual circumstances, to stop the course of action, and had, in fact, stopped as far as the 496d charges were concerned, and then apparently made an independent decision to flee from the officers and took off separately and independently . . . . The question is whether there was a continuing flight or not. I think the stolen vehicle was essentially one act, whether there's conduct involved with that act or not. And then the V[ehicle] C[ode] 2800.1 act was the act of jumping from the car and taking off and jumping the fence, which required the officers to detain him and continue with their taser efforts by the officers. I don't think it is a 654. I believe it is appropriately charged separately."

Section 654

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) Section 654, subdivision (a) provides that "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129.) "However, if the defendant harbored 'multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct.' " (*People v. Jones, supra,* at p. 1143.) " '[A] course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

"To sustain a conviction for receiving stolen property, the prosecution must prove: (1) the property was stolen; (2) the defendant knew the property was stolen . . . ; and, (3) the defendant had possession of the stolen property." (*People v. Land* (1994) 30 Cal.App.4th 220, 223.) The crime of receiving a stolen vehicle therefore was completed when defendant took possession of the car. Vehicle Code section 2800.1, subdivision (a), on the other hand, prohibits "operating a motor vehicle . . . with the intent to evade, willfully flee[] or otherwise attempt[] to elude a pursuing peace officer's motor vehicle."

Defendant argues that the second count was incidental to his "continuous intent and objective in an indivisible transaction to escape with the vehicle." Defendant is correct that the court should not have relied on his flight after leaving the stolen car to reach its conclusion that section 654 was inapplicable, since the count to which he pled guilty was evading arrest in a motor vehicle. Nonetheless, his conduct in receiving the stolen vehicle was followed by the separate attempt to evade arrest by failing to stop when the red light of the police car was activated. Without regard to defendant's conduct in fleeing from the car after the collision, there is substantial evidence to support the finding that defendant harbored separate intents in committing each crime, and the conclusion that the two counts are divisible and separately punishable. After taking possession of the stolen vehicle, defendant unquestionably had time to reflect before deciding to flee from the police, as the record indicates he did not fall under police suspicion until he was in the car and driving.

Without analysis, defendant compares this case to *People v. v. Chacon* (1995) 37 Cal.App.4th 52. In that case, two youths confined at a juvenile facility grabbed a librarian, stabbed her, and threatened to kill her if they were not given a vehicle. (*Id.* at p. 59.) They were convicted of kidnap for ransom, extortion, and escape by force and violence. The appellate court found that "[t]he kidnap for ransom, extortion, and escape were part of an indivisible transaction having a single objective: escape. We conclude that section 654 requires a stay of the sentences for escape and extortion." (*Id.* at p. 66, fn. omitted.) The record here does not support a finding that defendant took possession of the vehicle to evade the police. Defendant received the stolen vehicle before he was being pursued by the police and had any reason to flee. His act of fleeing was separate and divisible from the first offense and the trial court did not err in imposing a sentence for both crimes.[2]

[2] For the first time in his reply brief, defendant argues that because the charging document alleged that he "did willfully and unlawfully buy, receive, *conceal*, sell, *withhold*, and aid in *concealing*, selling and *withholding* a vehicle," evading arrest was part of the crime of receiving the stolen vehicle. In *People v. Chacon, supra*, 37

Rule 4.425 of the California Rules of Court

"[A] trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citations.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) Rule 4.425 of the California Rules of Court provides the criteria the trial court is to consider in deciding whether to impose consecutive or concurrent sentences. Among these is whether "[t]he crimes and their objectives were predominately independent of each other," and whether "[t]he crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior."

Although "the question of whether sentences should be concurrent or consecutive is separate from the question of whether section 654 prohibits multiple punishment," (*People v. Deloza* (1998) 18 Cal.4th 585, 594) the same reasoning supports the conclusion that the trial court did not abuse its discretion in finding that defendant had separate objectives in committing each crime and that the crimes were committed at different times.

Cal.App.4th at page 66, the court noted that "The prosecutor conceded that he 'overcharged' the case 'to allow for any legal technicalities or concerns and lesser included offenses or whatever.' Had appellants effected the escape before the kidnapping and extortion, separate punishment would be appropriate." (*Ibid.*, fn. 7.) Here the case was not "overcharged" and defendant "effected" the receipt of the stolen vehicle before attempting to escape in it. The complaint to which defendant pled guilty simply recited the statute that defendant was charged with violating. Defendant's guilty plea acknowledges that he committed one of the acts prohibited by the statute; it does not imply that he committed each type of act that would constitute a violation.

DISPOSITION

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Siggins, J.